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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 919

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL FOR THE STATE OF CALIFORNIA, MALCOLM HARRIS, Director for the State of California, ARTHUR F. BROWN, District Supervisor, Southern District of the Department of Alcoholic Beverage Control, JAMES D. KELLER, District Attorney for San Diego County, California, and JAMES E. MARABLE, District Attorney for Imperial County, California,

Appellants,

v.

AMMEX WAREHOUSE COMPANY OF SAN YSIDRO, INC. and AMMEX WAREHOUSE COMPANY, INC.,

Appellees.

MOTION TO AFFIRM

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In The

Supreme Court of the United States

October Term, 1963

No. 919

Department of Alcoholic Beverage Control for the State of California, Malcolm Harris, Director for the State of California, Arthur F. Brown, District Supervisor, Southern District of the Department of Alcoholic Beverage Control, James D. Keller, District Attorney for San Diego County, California, and James E. Marable, District Attorney for Imperial County, California,

Appellants,

v.

Ammex Warehouse Company of San Ysidro, Inc. and Ammex Warehouse Company, Inc.,

Appellees.

MOTION TO AFFIRM

This is a motion to affirm filed primarily to assist the Court in its determination as to whether briefs should be considered and oral argument heard before affirming the case. There is presently pending for decision No. 1077, *Donald S. Hostetter et al.* v. *Idlewild Bon Voyage Liquor Corporation*, and this Court's decision on the basic issues in such case will be determinative of the basic issues in this case. Hence affirmance in this case can probably follow from the decision in *Idlewild*. However, Appellees desire to make it clear that in this case, under Appellees' method of doing business, there is clearly no room for holding that the State of California has any right of regulation, be it reasonable

or otherwise, State police power being pre-empted by paramount federal laws. Unlike *Idlewild*, Appellees do business only out of private customs bonded warehouses (under customs lock) where full-time U. S. Customs officers are stationed (their salaries being reimbursed the U. S. by Appellees) and all withdrawals for exportation (which are the only withdrawals made) are made through such officers. Furthermore, actual exportation is effected by Appellees through delivery under bond to the Customs export control officer at the Mexican border. While these facts eliminate any real or imagined "possibility of diversion" for delivery or use within the State and to some extent make it more clear in this case that there is no area for State regulation, it should be made clear that the Idlewild Bon Voyage Corporation is likewise doing its business as directed by U. S. Bureau of Customs. The fact that U. S. Customs may, for reasons sufficient unto itself, waive as to Idlewild Bon Voyage Corporation some of the stringent requirements it imposes on Appellees, does not open the door to State regulation in Idlewild. This point was not made to Appellees' satisfaction on oral argument or by brief in the *Idlewild* case. Should there be any question about this, then Appellees join Appellants in inviting briefs and oral argument in this case, but if there be no question as to the correctness of Appellees' position, then this case should be affirmed on this motion.

A great many sections of the Tariff Act and regulations, together with corollary Internal Revenue provisions and regulations, are to be involved in any consideration of this case upon brief or argument, but Appellees pray the Court's indulgence in not placing complete copies of same in an appendix to this motion, and instead appending only selected statutes with which the Court may be concerned on this motion. Suffice it to say that there is no question but that Appellees' businesses are done pursuant to such referred

to but unquoted statutes and regulations, as is apparent from the fact the U. S. Bureau of Customs supervises the entire operation.

Upon the foregoing statement, Appellees now move this Honorable Court to affirm the judgment of the three-judge court (but not the opinion insofar as it states there is a right of reasonable regulation), and in support of this motion, would show:

I. STATUTES AND REGULATIONS INVOLVED

Appellants have stated all of the Constitutional provisions involved in this case, but have not stated all of the statutes and regulations involved. Appellees assert their right to conduct their businesses pursuant to the following statutes and regulations, only selected portions of which are set out in full in Appendix "A".

(1) Tariff Act of 1930, as amended, 46 Stat. 763, particularly §§ 308, 311, 553, 554, 555, 556, 557, 558, 564, 565, 585, 586, 592, 594, 595, 623 and 646, being 19, U.S.C., §§ 1308, 1311, 1553, 1554, 1555, 1556, 1557, 1558, 1564, 1565, 1585, 1586, 1592, 1594, 1595, 1623 and 1646.

(2) Internal Revenue Code of 1954, as amended, §§ 5232, 5242, 5243, 5247.

(3) Federal Alcohol Administration Act of 1935, as amended, 49 Stat. 977 (1935), §§ 3 and 4, being 27, U.S.C., § 203 and § 204. (See Appendix "A".)

(4) Racketeering Act of 1948, as amended, in 1961, by the addition of § 1a, 75 Stat. 498, being 18, U.S.C., § 1952. (See Appendix "A".)

(5) United States Customs Regulations, 19 C.F.R., Parts 4, 8, 12, (particularly 12.37), 18, (particularly 18.1, 18.2, 18.3, 18.5, 18.10, 18.16 through 18.24), 19 (particularly Parts 19.1 through 19.15), 21, 23 and 25.

(6) Alcoholic Beverage Control Act of California, §§ 23019, 23300, 23355, 23374, 23376, 23377, 23378, 23379, 23394, 23402, 23667, 23775, 23777, 23778, 23779. (These statutes, on their face, prohibit Appellees from conducting their proposed businesses). (See Appendix "A".)

II. STATEMENT OF THE CASE

The District Court's findings of fact (Appendix "B" of Appellants' Jurisdictional Statement) more accurately state the proposed operations of Appellees than does Appellants' statement of the case. The Court's findings cannot be improved upon.

III. THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL AND THE COURT SHOULD AFFIRM THE DISTRICT COURT

A. Jurisdiction of the Three-Judge Court Was Established Under 28, U.S.C., Section 1331 and Section 1337.

This case is clearly a case which arose under an Act of Congress regulating and protecting commerce, namely, the Tariff Act of 1930, as amended, by reason of which the District Court had jurisdiction pursuant to 28 U.S.C., § 1337, without regard for the amount in controversy. *Gully v. First National Bank in Meridian*, 299 U.S. 109, 57 S. Ct. 96, 81 L. Ed. 70 (1936). See also *Crispin v. Lykes Brothers S. S. Co.*, 134 F. Supp. 704 (D. C. Tex. 1955). The right of Appellees to carry on their proposed business which is authorized and controlled by the Constitutional provisions, statutes and regulations listed in Appellants' jurisdictional statement and in this motion, depends upon whether, in connection with the operation of such business, there is power of prohibition or regulation in the State of California under the 21st Amendment to the U. S. Constitution, or under any police power to reasonably reg-

ulate foreign commerce in a field occupied by Federal law. This involves the meaning of the 21st Amendment itself.

In addition to jurisdiction being conferred by 28, U.S.C., § 1337, jurisdiction is also established under 28, U.S.C., § 1331. On its face (without any necessity for construction), the Alcoholic Beverage Control Act of California *prohibits* Appellees from engaging in their lawful export business in the manner proposed. Moreover, counsel for Appellants stated that to be the case in open court. (See "The State Licensing Provisions" of the District Court's opinion in Appendix "A" of Appellants' brief). This court has stated in *Gibbs* v. *Bucks*, 307 U.S. 66, 59 S. Ct. 725 83 L.Ed. 1111 (1939), that "the issue on jurisdiction is the value of the right to conduct the business free of the prohibition . . ." and the Three-Judge District Court herein found the value of the businesses to exceed $10,000.00 each.

B. The Prior Decisions of This Court Are Controlling and So Clearly Support the Decision of the Court Below That This Court Should Affirm.

The position of Appellees upon the merits of this case is briefly stated in the following two paragraphs:

1. **The Federal Government, under its superior right, has completely legislated in the field in which action has been unconstitutionally attempted by the State of California.** Appellees hold a permit under the Federal Alcohol Administration Act (see Appendix "A") which authorizes them to engage in the business which they are conducting so long as they do not, in doing so, violate any State law (provided, of course, that such law be constitutional). Furthermore, Appellees only engage in the business of importing liquor for exportation from the United States, a business for which Congress, under the Tariff Act, has provided an elaborate bonding, warehousing and supervisory procedure in order to make possible the carrying out by private citizens of a desired Federal policy relative to tax and duty-

free exportations. The system of Federal law under which Appellees do business is so complete as to leave no area for State regulation, any such regulation, whether reasonable or not, being an invasion of a field pre-empted by Federal law and control. Should Appellees attempt to engage in any other business than what they are doing, then, unless there was compliance with State law, Appellees would be bootleggers subject to having all Federal permits cancelled and prosecution under the Racketeering statute, plus prosecution for possible customs violations. This would not deprive the State of its right to prosecute Appellees as law violators. Appellees say that in this case, since Congress under the Commerce Clause, as strengthened by the Export-Import Clause, has legislated in the field in question under a paramount right to do so (the 21st Amendment not being involved), the Federal law is supreme and the California statute cannot be constitutionally applied.

2. **Appellees' businesses do not come within the 21st Amendment, hence California cannot uphold its statute under the 21st Amendment.** Since no liquor is imported or transported into the State of California by Appellees for "delivery or use" therein (only for exportation into the Republic of Mexico), the 21st Amendment does not give the State of California the power to prohibit (or regulate), the commerce. Congressional power under the Commerce and Export-Import Clauses is ordinarily subject only to the possible exercise of police power of the State by means of reasonable regulation, except when, as is the case here, such police power is abrogated by reason of the fact that Congress has covered the field by complete legislation, and under the Supremacy Clause, any attempted State action is unconstitutional. Furthermore, Congress did not, by the Wilson or Webb-Kenyon Acts, negate any of the powers under which it has legislated and controls Appellees'

businesses. A combination historical and categorical analysis of the decisions by this Court and the laws make clear the conclusions expressed.

Prior to the 18th Amendment, the regulation or suppression of liquor traffic was a matter of local concern, except insofar as the authority of the states was circumscribed by the Commerce Clause. *License Cases*, 5 How. 504, 12 L. Ed. 256 (1847); *Bowman* v. *Chicago N. W. Ry. Co.*, 125 U.S. 465, 8 S. Ct. 689, 29 L. Ed. 502 (1888); and *Leisy* v. *Hardin*, 135 U.S. 100, 10 S. Ct. 681, 34 L. Ed. 128 (1890), where the Court said:

> "The responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the State in dealing with the imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action."

Congress, taking its cue from such cases, to remedy the difficulties experienced by the states in attempting to enforce local liquor laws, in 1890, passed the Wilson Act. Thereafter, this Court, in *Rhodes* v. *Iowa*, 170 U.S. 412, 18 S. Ct. 664, 42 L. Ed. 1088 (1898), construed the Wilson Act to mean that the state liquor laws would not operate against a consignee who received the liquor in interstate commerce for his own use. Accordingly, to remedy that situation, Congress, in 1913, passed the Webb-Kenyon Act. In *Adams Express Co.* v. *Kentucky*, 238 U.S. 190, 35 S. Ct. 824, 59 L. Ed. 1267 (1915), this Court held that *Webb-Kenyon* did not abrogate congressional power over interstate shipments (and more certainly it could not be so construed insofar as foreign commerce is concerned), saying:

> ". . . Except as affected by the Wilson act, which permits the state laws to operate upon liquors after

termination of the transportation to the consignee, and the Webb-Kenyon act, which prohibits the transportation of liquor into the state, to be dealt with therein in violation of local law, the subject-matter of such interstate shipment is left untouched and remains within the sole jurisdiction of Congress under the Federal Constitution."

Incidentally, at this point, it should be demonstrated that this Court held, prior to the 21st Amendment, that by use of the word "into" in federal statutes dealing with liquor, Congress was in effect using a word of art to define the area of permissible application of State laws to liquor which entered a State to directly or perhaps indirectly become a part of the mass of goods of that State, and referred to the State of final destination rather than intermediary States through which it might, of necessity, pass to reach its destination. In *United States* v. *Gudger*, 249 U.S. 373, 39 S. Ct. 323, 63 L. Ed. 653 (1919), this Court held:

". . . We are of the opinion that there is no ground for holding that the prohibition of the statute against transporting liquor in interstate commerce 'into any state or territory the laws of which state or territory prohibit the manufacture, etc.,' includes the movement in interstate commerce through such a state to another. No elucidation of the text is needed to add cogency to this plain meaning, which would, however, be reinforced by the context if there were need to resort to it, since the context makes clear that the word 'into' as used in the statute, refers to the state of destination, and not to the means by which that end is reached, the movement through one state as a mere incident of transportation to the state into which it is shipped."

That the 21st Amendment, when it was subsequently adopted, and Webb-Kenyon, when re-enacted following the 21st Amendment, were framed with a like intent in the use of

such word cannot now be argued in view of such holdings by this Court as in *Carter* v. *Virginia*, 321 U.S. 131, 64 S. Ct. 464, 88 L. Ed. 605 (1944), and *Collins* v. *Yosemite*, 304 U.S. 518, 58 S. Ct. 1009, 82 L. Ed. 1502 (1938).

From the foregoing, it is apparent that the *Wilson* and *Webb-Kenyon Acts* were not made necessary by the 21st Amendment, but were originally enacted prior thereto so as to make as clear as possible the area in which Congress, notwithstanding its paramount powers under the Commerce Clause, desired that State action over liquor be upheld. As such cases make clear, however, Congress did not abdicate all of the powers possessed by it over interstate and foreign commerce in liquor.

Then followed prohibition and complete Federal control. Finally came the 21st Amendment which accomplished basically what Congress had prior to prohibition done by the *Wilson* and *Webb-Kenyon Acts*. That Congress so construed the amendment (i.e., that it still had power to legislate in the field) is evident by its prompt passage of the *Federal Acohol Administration Act*, August 29, 1935, 49 Stat. 977, 27 U.S.C. Section 201 et seq. The purpose of the Act, as stated in Sec. 3, was "effectively to regulate interstate and foreign commerce in distilled spirits, wine, and malt beverages, to enforce the 21st Amendment, and to protect the revenue and enforce the postal laws with respect to distilled spirits, wine and malt beverages."

Having brought the argument to the point of the enactment of the 21st Amendment, Appellees would not only demonstrate that the 21st Amendment does not provide any constitutional sanction for State control but also that this case transcends the scope of any cases previously decided (unless *Idlewild* be decided in the interim of this brief),

which cases generally have fallen into the following categories:

a. Those cases in which the 21st Amendment is directly involved because liquor is being imported or transported into a State for delivery or use therein. Where this is involved, the State may go so far as to prohibit, this being the intent of the 21st Amendment. In this category are such cases as *State Board of Equalization* v. *Young's Market*, 299 U. S. 59, 57 S. Ct. 77, 81 L. Ed. 38 (1936), (one of the earliest cases decided after the Amendment); *Ziffrin, Inc.* v. *Reeves*, 308 U.S. 132, 84 L. Ed. 128, 60 S. Ct. 163 (1939) and *Joseph Finch & Co.* v. *McKittrick*, 305 U.S. 395, 59 S. Ct. 256, 83 L. Ed. 246 (1939). Importation for delivery or use in California is not involved in this case. All liquor is in the stream of foreign commerce for exportation into the Republic of Mexico.

b. Those cases in which liquor is simply being transported through a state on an interstate journey and reasonable regulation under the States' police power (not the 21st Amendment) is permitted to insure no diversion, the test of reasonableness being measured by the extent to which normal interstate commerce in liquor is burdened. In this category are the cases of *Carter* v. *Virginia*, 321 U.S. 131, 64 S. Ct. 464, 88 L. Ed. 605, (1944); and *Duckworth* v. *Arkansas*, 314 U.S. 390, 62 S. Ct. 311 86 L. Ed. 294 (1941); and *Gordon* v. *Texas*, 355 U.S. 369, 78 S. Ct. 363, 2 L. Ed. 2d 352 (1958). While these cases demonstrate that the 21st Amendment cannot be used by a state to support laws of imposing burdens on the through transportation of liquor (which almost goes without saying), they do not settle the issue here because none of them involved "through" transportation in foreign commerce under Federal supervision pursuant to comprehensive Federal laws, and it is maintained in this Brief that this removes the possibility of state

regulation. For example, in *Duckworth*, the Supreme Court states: "The Arkansas Statute does not conflict with any act of Congress." In other words, though in *Duckworth* the regulation was approved as reasonable, the Court made it clear no out and out conflict with a paramount Federal statute was involved as is the case here. Here the California permit system does conflict with the Federal laws, as would any type of "permit" regulation.

c. The group of cases where this Court and other Federal Courts have held that though the liquor came within the 21st Amendment, Federal statutes (such as Anti-Trust Laws) could also be enforced. These cases do not involve the supremacy of Federal law, only the power of Congress under the Commerce Clause versus the power of the State under the 21st Amendment. Cases in this category are such cases as: *United States* v. *Frankfort Distilleries*, 324 U.S. 293, 65 S. Ct. 661 89 L. Ed. 95 (1945) (Sherman Act); *Hanf* v. *United States*, 235 F. 2d 710 (8th Cir. 1956) (27 U.S.C. Sec. 203); and *Jatros* v. *Bowles*, 143 F. 2d 453 (6th Cir. 1944) (Price Control). State law under the 21st Amendment cannot render inapplicable Federal laws.

d. A group of cases where supremacy of Federal jurisdiction is held to prevent State action notwithstanding the 21st Amendment. These are the cases of *Johnson* v. *Yellow Cab Transit Co.*, 321 U.S. 383, 64 S. Ct. 622, 88 L. Ed. 814 (1944); and *Collins* v. *Yosemite Park and Curry Co.*, 304 U.S. 518, 58 S. Ct. 1009, 82 L. Ed. 1502 (1938), involving Federal reservations located within the boundaries of a State, and hold that the State cannot require permits of those selling liquor or transporting it into the Federal reservations. These cases do demonstrate the supremacy of the Federal law over the power of States under the 21st Amendment and that the Amendment doesn't apply to "through" transportation, but factually are not on all fours

only because no Federal reservation is involved in this case. The analogy, however, is strong since the liquor here is at all times, under direct custody and control of U. S. Customs officers.

As stated at the outset, this case transcends the scope of previous cases. The decision by this Court will not affect California's administration of its liquor laws to any situation other than to Appellees. Its effect will simply be to hold that California cannot engraft on to this fully and completely regulated Federal business in foreign commerce (and Federal regulation is not only to protect Federal revenue but also State interests under the 21st Amendment), California's permit and price control system — the California system being one which dictates who may have permits, who such permittees must buy from (only other permittees of a designated class), who such permittees must sell to and the prices to be charged, how transportation and storage will be handled (including inspection rights in contravention of Federal dominion), how records will be kept, etc., and, in this instance, provides no permit for Appellees which prevents Appellees from carrying on their lawful business. Such a law, while protecting obvious State interests insofar as liquor for "delivery or use" in California is concerned, serves no police or other legitimate purpose in the case of Appellees' business. Since it interferes with Federal officers and overlaps their function, it would have to be justified on some ridiculous basis such as a lack of trust in Federal officers enforcing Federal laws designed to keep liquor from becoming a part of the mass of goods in California prior to being exported. This basis cannot support any such asserted policy power because the Courts of California have recognized that, insofar as liquor is concerned, the effective purpose and result of the "in-bond" procedure under the Tariff Act is to keep the liquor from

becoming a part of the mass of goods within the State of California. *National Distillers Products Corp.* v. *City and County of San Francisco*, 141 Cal. App. 2d 651, 297 P. 2d 61 (1956), and hence provides no basis for State action. In other words, the "in-bond" procedure not only clearly removes the case from the 21st Amendment, but it, together with the Federal permit system, eliminates State police power. If *McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414, 60 S. Ct. 664, 84 L. Ed. 840 (1940), involved liquor instead of oil, there would not be even the slightest room for argument and indeed there should be none. Surely this Court could decide no differently on this question than did the California Court and the New York Court in *During* v. *Valente*, 267 App. Div. 383, 46 N.Y.S. 2d 385 (1944), when it held the New York Alcoholic Beverage Control Law inapplicable in the New York free-trade zone. The New York Court met head-on the asserted distinction between oil in *McGoldrick* and whiskey, and held it made no difference, stating what Appellees assert to be the obvious conclusion, that:

> " 'The regulatory powers of the State Liquor Authority (do not) extend to international transactions, even in alcoholic beverages, except sales for domestic consumption in New York,' 108 N.Y.S. 2d at 9."

This Court, in applying U. S. Constitutional principles dependent upon whether or not a commodity is in the stream of foreign commerce is involved, has usually not had a situation where Federal officers see to it that once the commodity is placed in the stream, it cannot leave. The more typical situation is where the Court has had to recognize that intent alone is sufficient to determine the character of a shipment and temporary stoppages or breaks in transit do not remove it from the stream so long as the carrying out of the original intent remains the purpose of the parties

involved. For example, see *T & N. O. R. R. Co.* v. *Sabine Tram Co.*, 227 U.S. 111, 33 S. Ct. 229, 57 L. Ed. 442 (1913), wherein it is held that it is "the nature of the traffic, and not its accidents, which determines its character (as interstate, foreign, or intrastate commerce) . . ." There, because the lumber designed for export was shipped via railroad from the Texas mills to a Texas seaboard wharf on one bill of lading and stored on the wharf until a ship became available for transportation to a foreign country, the contention was made that intrastate rates, under Texas Railroad Commission rules, applied rather than rates prescribed for foreign commerce by the Interstate Commerce Commission. The "accidents" of the journey referred to were the bill of lading and temporary stoppage and storage. The Court held the journey to be governed by Interstate Commerce Commission rules and rates because its character was fixed by the intent of the shipper to export which existed from the moment of shipment. This same result followed in the case of *Santa Cruz Fruit Packing Co.* v. *N. L. R. R.*, 303 U.S. 453, 58 S. Ct. 656, 82 L. Ed. 954 (1938), where there was temporary storage. Surely the intent of Ammex alone (which is made clear from every document it files and every step it takes) without the bonds and supervision suffices to put this liquor in the stream of foreign commerce. Temporary storage in California and delivery to Customs at the export lot for transfer to the Mexican importer do not change this character. If, however, intent was all the Court had to deal with, then it might be argued that since liquor is involved, regulation ought to be permissible, if reasonable, as in *Carter*, *Duckworth* and *Gordon*, where the Court could suspect that a mere "change of mind" might put the liquor into use in the States in question. In this case, a change of mind is not possible. This is so because the "in bond" procedure, by putting the liquor under Federal supervision, effectively

removes it from Appellees' control and use. Federal officers see to it there is no change in mind. Since Appellees only use a basic importer's permit, Federal officers could not permit withdrawal without being shown Appellees possess proper State permits for liquor to be delivered or used within the State. Thus this Court is not reviewing a situation where protection for the State of California depends upon Appellees' honesty as in *Carter*, *Duckworth* and *Gordon*, and, by the same token, there is no permissible area of State regulation.

To attempt to superimpose State regulation on complete Federal control is certainly violative of the Federal supremacy principle *Hines* v. *Davidowitz*, 312 U.S. 52, 61 S. Ct. 399, 85 L. Ed. 581 (1941) and also is contrary to this Court's holding in *Board of Trustees of University of Illinois* v. *United States*, 289 U.S. 48, 53 S. Ct. 509, 77 L. Ed. 1025 (1933), as to the exclusive and plenary powers of Congress over foreign commerce. In such case, this Court pointed out that:

> "The Tariff Act of 1922 is entitled, 'An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes.' The Congress thus asserted that it was exercising its constitutional authority 'to regulate Commerce with foreign Nations.' Article 1, Sec. 8, cl. 3. The words of the Constitution 'comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend.' Gibbons v. Ogden, 9 Wheat. 1, 193, 6 L. Ed. 23. It is an essential attribute of the power that it is exclusive and plenary. *As an exclusive power, its exercise may not be limited, qualified, or impeded to any extent by state action.* Id., pages 196-200 of 9 Wheat., 6 L. Ed. 23; Brown v. Maryland, 12 Wheat. 419, 446, 6 L. Ed. 678; Almy v.

California, 24 How. 169, 173, 16 L. Ed. 644; Buttfield v. Stranahan, 192 U.S. 470, 492, 493, 24 S. Ct. 349, 48 L. Ed. 525. The power is buttressed by the express provisions of the Constitution denying to the States authority to lay imposts or duties on imports or exports without the consent of the Congress. Article 1, Sec. 10, cl. 2.

• • •

". . . In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power. There is thus no violation of the principle which petitioner invokes, for there is no encroachment on the power of the state as none exists with respect to the subject over which the federal power has been exerted" . . .

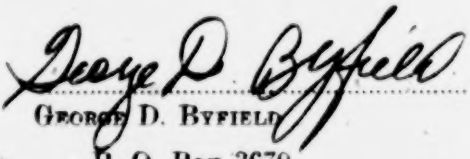
Clearly, the Court is dealing here in an area where Congress has exclusive and plenary powers, which powers it has exercised and has done so with the States in mind. By use of the permit system as well as the bond procedure, the Federal Government protects the States against diversions from foreign commerce in violation of State laws under the 21st Amendment. California's laws are not being flaunted, but will be upheld in the area where they can operate. To the extent that such laws have transgressed their proper area, it was proper to grant the injunction as the Court below did.

IV. CONCLUSION

Because Appellees' liquor, which is for exportation only, is in the constant stream of foreign commerce, passing through the State of California under constant control, possession and supervision of the Federal Government, and because it does not become a part of the mass of goods of the State of California, the 21st Amendment does not

confer upon the State any right of control. Under the authorities, the only right of control which could be left to the State of California would arise under the police power of the State and only then in the absence of supervening Congressional action could California burden interstate commerce. Since Congress has completely pre-empted the field insofar as importations and exportations of intoxicating liquors in foreign commerce are concerned, there is no room for any type of State control whatsoever over Appellees' lawfully sanctioned export business and the judgment below should be affirmed.

Respectfully submitted,



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CERTIFICATE

I, George D. Byfield, do hereby certify that four copies of the foregoing brief and motion to affirm were mailed by me on this the 10 day of April, 1964, to the attorneys for appellant at 600 State Building, Los Angeles 12, California (in an envelope properly addressed and with the required postage for regular United States Mail), as follows:

Stanley Mosk, Attorney General of the State of California;

E. G. Funke, Assistant Attorney General
Felice R. Cutter, Deputy Attorney General
Warren H. Deering, Deputy Attorney General

George D. Byfield

George D. Byfield

APPENDIX "A"

27 U.S.C. § 203: **Unlawful businesses without permit; application to state agency**

In order effectively to regulate interstate and foreign commerce in distilled spirits, wine, and malt beverages, to enforce the twenty-first amendment, and to protect the revenue and enforce the postal laws with respect to distilled spirits, wine, and malt beverages:

(a) It shall be unlawful, except pursuant to a basic permit issued under this chapter by the Secretary of the Treasury —

(1) to engage in the business of importing into the United States distilled spirits, wine, or malt beverages; or

(2) for any person so engaged to sell, offer or deliver for sale, contract to sell, or ship, in interstate or foreign commerce, directly or indirectly or through an affiliate, distilled spirits, wine, or malt beverages so imported.

(b) It shall be unlawful, except pursuant to a basic permit issued under this chapter by the Secretary of the Treasury —

(1) to engage in the business of distilling distilled spirits, producing wine, rectifying or blending distilled spirits or wine, or bottling, or warehousing and bottling, distilled spirits; or

(2) for any person so engaged to sell, offer or deliver for sale, contract to sell, or ship, in interstate or foreign commerce, directly or indirectly or through an affiliate, distilled spirits or wine so distilled, produced, rectified, blended, or bottled, or warehoused and bottled.

(c) It shall be unlawful, except pursuant to a basic permit issued under this chapter by the Secretary of the Treasury —

(1) to engage in the business of purchasing for resale at wholesale distilled spirits, wine, or malt beverages; or

(2) for any person so engaged to receive or to sell, offer or deliver for sale, contract to sell, or ship, in interstate or foreign commerce, directly or indirectly or through an affiliate, distilled spirits, wine, or malt beverages so purchased.

This subsection shall take effect July 1, 1936.

This section shall not apply to any agency of a State or political subdivision thereof or any officer or employee of any such agency, and no such agency or officer or employee shall be required to obtain a basic permit under this chapter.

27 U.S.C. § 204: **Permits**

(a) **Who entitled thereto**. The following persons shall, on application therefor, be entitled to a basic permit:

(1) Any person who, on May 25, 1935, held a basic permit as distiller, rectifier, wine producer, or importer issued by an agency of the Federal Government.

(2) Any other person unless the Secretary of the Treasury finds (A) that such person (or in case of a corporation, any of its officers, directors, or principal stockholders) has, within five years prior to date of application, been convicted of a felony under Federal or State law or has, within three years prior to date of application, been convicted of a misdemeanor under any Federal law relating to liquor, including the taxation thereof; or (B) that such person is, by reason of his business experience, financial standing, or trade connections, not likely to commence operations within a reasonable period or to maintain such operations in conformity with Federal law; or (C) that the operations proposed to be conducted by such person are in violation of the law of the State in which they are to be conducted.

(b) **Refusal of permit; hearing.** If upon examination of any application for a basic permit the Secretary of the Treasury has reason to believe that the applicant is not entitled to such permit, he shall notify the applicant thereof and, upon request by the applicant, afford him due notice and opportunity for hearing on the application. If the Secretary of the Treasury, after affording such notice and opportunity for hearing, finds that the applicant is not entitled to a basic permit hereunder, he shall by order deny the application stating the findings which are the basis for his order.

(c) **Form of application.** The Secretary of the Treasury shall prescribe the manner and form of all applications for basic permits (including the facts to be set forth therein) and the form of all basic permits, and shall specify in any basic permit the authority conferred by the permit and the conditions thereof in accordance with the provisions of this chapter. To the extent deemed necessary by the Secretary of the Treasury for the efficient administration of this chapter, separate applications and permits shall be required by the Secretary of the Treasury with respect to distilled spirits, wine, and malt beverages, and the various classes thereof, and with respect to the various classes of persons entitled to permits hereunder. The issuance of a basic permit under this chapter shall not operate to deprive the United States of its remedy for any violation of law.

(d) **Conditions.** A basic permit shall be conditioned upon compliance with the requirements of section 205 of this title (relating to unfair competition and unlawful practices) and of section 206 of this title (relating to bulk sales and bottling), with the twenty-first amendment and laws relating to the enforcement thereof, and with all other Federal laws relating to distilled spirits, wine, and malt beverages, including taxes with respect thereto.

(e) **Revocation, suspension and annulment.** A basic permit shall by order of the Secretary of the Treasury, after due notice and opportunity for hearing to the permittee, (1) be revoked, or suspended for such period as the Secretary of the Treasury deems appropriate, if the Secretary finds that the permittee has willfully violated any of the conditions thereof, provided that for a first violation of the conditions thereof the permit shall be subject to suspension only; or (2) be revoked if the Secretary finds that the permittee has not engaged in the operations authorized by the permit for a period of more than two years; or (3) be annulled if the Secretary finds that the permit was procured through fraud, or misrepresentation, or concealment of material fact. The order shall state the findings which are the basis for the order.

(f) **Service of orders.** Orders of the Secretary with respect to any denial of application, suspension, revocation, annulment, or other proceedings, shall be served (1) in person by any officer or employee of the Secretary designated by him or any internal revenue or customs officer authorized by the Secretary for the purpose, or (2) by mailing the order by registered mail, addressed to the applicant or respondent at his last known address in the records of the Secretary.

(g) **Duration.** A basic permit shall continue in effect until suspended, revoked, or annulled as provided herein, or voluntarily surrendered; except that (1) if leased, sold or otherwise voluntarily transferred, the permit shall be automatically terminated thereupon, and (2) if transferred by operation of law or if actual or legal control of the permittee is acquired, directly or indirectly, whether by stock-ownership or in any other manner, by any person, then such permit shall be automatically terminated at the expiration of thirty days thereafter: *Provided*, That if

within such thirty-day period application for a new basic permit is made by the transferee or permittee, respectively, then the outstanding basic permit shall continue in effect until such application is finally acted on by the Secretary of the Treasury.

(h) **Appeal; procedure.** An appeal may be taken by the permittee or applicant for a permit from any order of the Secretary of the Treasury denying an application for, or suspending, revoking, or annulling, a basic permit. Such appeal shall be taken by filing, in the court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, within sixty days after the entry of such order, a written petition praying that the order of the Secretary be modified or set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Secretary, or any officer designated by him for that purpose, and thereupon the Secretary shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Secretary shall be considered by the court unless such objection shall have been urged before the Secretary or unless there were reasonable grounds for failure so to do. The finding of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Secretary, the court may order such additional evidence

to be taken before the Secretary and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Secretary may modify his findings as to the facts by reason of the additional evidence so taken, and he shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Secretary shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28. The commencement of proceedings under this subsection shall, unless specifically ordered by the court to the contrary, operate as a stay of the Secretary's order.

(i) **Limitation**. No proceeding for the suspension or revocation of a basic permit for violation of any condition thereof relating to compliance with Federal law shall be instituted by the Secretary more than eighteen months after conviction of the violation of Federal law, or, if no conviction has been had, more than three years after the violation occurred, and no basic permit shall be suspended or revoked for a violation of any such condition thereof if the alleged violation of Federal law has been compromised by any officer of the Government authorized to compromise such violation.

18 U.S.C. § 1952. **Interstate and foreign travel or transportation in aid of racketeering enterprises**

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraph (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

California Alcoholic Beverage Control Act, Business and Professions Code

23019. **"Customs broker."** "Customs broker" means every person who is authorized to act as agent or broker for a person licensed as an importer or for a person whose place of business is without the State, in regard to the importing of alcoholic beverages into the State in United States internal revenue bond or in United States customs bond.

23300. **When license required.** No person shall exercise the privilege or perform any act which a licensee may

exercise or perform under the authority of a license unless the person is authorized to do so by a license issued pursuant to this division.

23355. **License privileges; deliveries.** Except as otherwise provided in this division and subject to the provisions of Section 22 of Article XX of the Constitution, the licenses provided for in Article 2 of this chapter authorize the person to whom issued to exercise the rights and privileges specified in this article and no others at the premises for which issued during the year for which issued. Deliveries of distilled spirits by a licensee to another licensee may be made from the vendor's licensed premises or from a warehouse located within the county in which the vendor's licensed premises are located except as permitted by Section 23383. Deliveries to a licensed importer may also be made from any point outside the State.

23374. **Importer.** Any importer's license authorizes the person to whom issued to become an importer of alcoholic beverages specified in the license, to export the alcoholic beverages, and to transfer the beverages to himself under another license.

23376. **Customs broker.** A customs broker's license authorizes the transfer to licensed importers of alcoholic beverages brought into the State in United States internal revenue bond or in United States customs bond and the exportation of the alcoholic beverages. The holder of a customs broker's license may receive delivery of, possess, export, and transfer to licensed importers such alcoholic beverages as are brought into this State in United States internal revenue bond or customs bond. Such a license also authorizes the possession and exportation of alcoholic beverages acquired from licensed manufacturers or wine growers for export.

23377. **Wine broker.** A wine broker's license authorizes the person to whom issued to act as a wine broker, for a fee or commission, in the purchase of wine for or on behalf of a person within or without this State authorized to buy wine for purposes of resale and in the sale of wine for on behalf of a person, other than a retail licensee, licensed to sell wine within the State. A wine broker shall not buy or sell any wine for his own account, take or deliver title to wine, or receive or store any wine in his own name in this State. A wine broker shall not offer to sell, agree to offer to sell, or sell any wine unless he first has a bona fide authorization to do so from a person, other than a retail licensee, licensed to sell wine in this State. A wine broker shall not offer to buy, agree to buy, agree to offer to buy, or buy any wine unless he first has a bona fide authorization to do so from a person within or without this State authorized to buy wine for purposes of resale. The exercise of the privileges granted by the wine broker's license are subject to such rules and conditions as the department deems necessary and proper.

23378. **Wholesaler.** Any wholesaler's license authorizes the sale of the alcoholic beverage specified in the license only to persons holding licenses issued by the department authorizing the sale of the alcoholic beverage, and authorizes the exportation of the alcoholic beverage.

23379. **Beer and wine wholesaler.** A beer and wine wholesaler's license also authorizes the labeling, bottling, or packaging of wine in accordance with and subject to the rules of the State Department of Public Health. A beer and wine wholesaler's license shall not permit the sale or delivery of wine to consumers in containers supplied, furnished, or sold by the consumer.

23394. **Off-sale general privileges.** An off-sale general license includes the privileges specified in Section 23393

and authorizes the sale, to consumers only and not for resale, of distilled spirits in packages of not more than one gallon and in packages containing not less than one-half pint, for consumption off the premises where sold.

23402. **Purchase by retail licensees.** No retail on- or off-sale licensee shall purchase alcoholic beverages for resale from any person except a person holding a beer manufacturer's, wine grower's, rectifier's, brandy manufacturer's, or wholesaler's license.

23667. **Importer's receipt to carrier.** Common carriers transporting alcoholic beverages into this State for delivery or use within this State or common carriers making delivery of alcoholic beverages so transported shall obtain from the licensed importer or customs broker a receipt on a form prescribed by the department for the alcoholic beverages so transported and delivered. If the consignee refuses to give the receipt and show his license to the carrier, the carrier is relieved of all responsibility for delivery of the alcoholic beverages.

23775. **Importer.** An importer's license shall be issued only to a person or manufacturer who holds a license authorizing the sale for resale of the types of alcoholic beverages mentioned in the importer's license.

23776. **Wholesaler.** A wholesaler's license shall not be issued to any on-sale licensee.

23777. **Same; cities of 50,000.** No off-sale general license shall be renewed or issued to a distilled spirits wholesaler whose premises are located in a city having a population of 50,000 or more, as shown by the 1940 federal census, or to a distilled spirits wholesaler who sells distilled spirits to licensees whose premises are located in any city having a population of 50,000 or more, as shown by the 1940 federal census.

23778. **Same; stock of spirits.** A distilled spirits wholesaler's license shall not be held by any person unless at all times throughout the license year he has on his wholesale premises a reasonable stock of distilled spirits, as determined by the department, for which he has fully paid lawful money or its equivalent.

23779 **Same; good faith.** No wholesale license shall be issued to any person who does not in good faith actually carry on or intend to carry on a bona fide wholesale business by sale to retail licensees of the alcoholic beverage designated in the wholesale license, and the department may revoke any wholesale license when the licensee fails for a period of 45 days actively and in good faith to engage in the wholesale business and shall revoke any distilled spirits wholesaler's license held by any person who fails to comply with applicable provisions of Sections 23378, 23379, 23776, 23777, and 23778. Sale by a wholesale licensee to himself as a retail licensee is not the transaction of a bona fide wholesale business.